

**SYNOPSIS OF CRIMINAL OPINIONS IN THE COURT OF APPEALS OF THE STATE
OF MISSISSIPPI HANDED DOWN JUNE 15, 2010**

Williams v. State, No. 2009-KA-00900-COA (Miss.App. June 15, 2010)

CRIME: Count I: Aggravated assault and Count II: Possession of a weapon by a convicted felon

SENTENCE: Count I: 15 years w/ 5 years PRS; Count II: 5 years concurrently w/ Count I

COURT: Tunica County Circuit Court

TRIAL JUDGE: Hon. Albert Smith, III

APPELLANT ATTORNEY: Dan Hinchcliff

APPELLEE ATTORNEY: Stephanie Wood

DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Count I reversed and remanded; Count II reversed and rendered. Roberts, J. for the Court. King, C.J., Lee and Myers, P.J.J., Griffis, Ishee and Maxwell, JJ., Concur. Irving, J., Concurs in Part and Dissents in Part with Separate Written Opinion Joined in Part and in Result by Barnes, J. Carlton, J., Not Participating.

ISSUES: (1) Whether the evidence was sufficient in Count II, and (2) Whether the admission of William's prior felony conviction was improper and prejudicial.

FACTS: On June 21, 2008, Jackson Williams, Jr. stabbed Edward Walls with a pocket knife. Williams claimed that Walls was assaulting him, and he was defending himself when he stabbed Walls. However, Walls claimed that he was simply speaking with Williams when Williams stabbed him without provocation. The defense stipulated that Williams was a prior convicted felon. (He had been convicted of second degree murder in Tennessee in 1984).

HELD: The evidence was insufficient to show the knife possessed by Williams was prohibited under §97-37-5(1). The knife in question was a small ordinary pocket knife with a 2½ inch blade. The State conceded the evidence was insufficient.

==>Given the reversal of Count II, the Court held that the admission that Williams was a prior felon prejudiced him regarding his aggravated assault charge. Although never recognized in Mississippi, the COA adopted the doctrine retroactive misjoinder. This occurs when a trial or appellate court determines that while joinder of two or more counts against a defendant was initially proper, one or more of those counts should be vacated. Furthermore, if the defendant can show that he suffered clear and compelling prejudice as a result of the evidence introduced to support the vacated count, he is entitled to a new trial on the remaining count(s).

==>To determine if a defendant was prejudiced, the Court adopted a two-factor analysis: (1) was evidence admitted at trial on the vacated count that would not have otherwise been admissible on the remaining count and, if so, (2) can the defendant demonstrate clear prejudice as a result of the inadmissible evidence that was presented to the jury.

==>Using this test, Williams was clearly prejudiced by allowing the jury to hear he was a felon. Additionally, the jury was neither instructed to consider Williams's prior conviction solely in consideration of the felon-in-possession count nor was it instructed to consider each count separately. Williams's credibility was clearly in issue with his claim of self-defense. The jury should never have known Williams was a prior felon. In the interests of justice, Williams should have a new trial.

IRVING, J., CONCURRING IN PART, DISSENTING IN PART:

==>Judge Irving agreed that the felon in possession count should be reversed, but believed the aggravated assault conviction should stand. Williams stipulated to the fact he was a felon. "In fact, it seems to me that he should be procedurally barred, as he created the alleged error of which he now complains." Williams failed to show prejudice. The jury was not told his prior conviction was for second degree murder. Williams has not demonstrated that the prosecution improperly or inappropriately used the fact that he is a convicted felon to prejudice or bias the jury. He found it highly probable that the "spillover evidence" figured into the jury's decision to convict Williams of aggravated assault.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62585.pdf>

Lipsey v. State, No. 2008-KA-00607-COA (Miss.App. June 15, 2010)

CRIME: 3 counts of Murder and one count of Kidnapping

SENTENCE: Life on Counts I-III, and 30 years on Count IV, all to be served consecutively as an habitual offender

COURT: Hinds County Circuit Court

TRIAL JUDGE: Hon. Winston L. Kidd

APPELLANT ATTORNEY: Lynn Watkins, Bill LaBarre, Greta Harris

APPELLEE ATTORNEY: John Henry

DISTRICT ATTORNEY: Robet Shuler Smith

DISPOSITION: Affirmed. Barnes, J., for the Court. King, C.J., Lee and Myers, P.JJ., Irving, Griffis, Ishee, Roberts, Carlton and Maxwell, JJ., Concur.

ISSUES: That the trial court deprived him of his opportunity to present a complete defense when the court: (1) barred him from presenting the testimony of an alibi witness, (2) granted the State's motion in limine to restrict testimony regarding cocaine found in the victims' blood or to refer to the murder scene as a "crack house," and refused to permit Lipsey to make a proffer, (3) denied him the opportunity for recross-examination, (4) improperly admitted autopsy pictures, and (5) by denying Lipsey's motion to dismiss for failure to grant him a speedy trial.

FACTS: Dexter Lipsey was convicted in the Hinds County Circuit Court for the murders of Louise T. Ray, J.W. Gilbert, and Bruce Rankin, and the kidnaping of Rebecca Virden. On November 10,

2005, Lipsey, a man Virden previously knew only by the nickname of "D," entered her room at Ray's house, holding a rifle, and ordered her to come into the living room. Gilbert and Rankin were sitting on the couch. Lipsey demanded that Ray pay him the \$25 he claimed that she owed. Lipsey shot Ray when she did not pay. Virden put her head between her knees, then heard a second shot. Lipsey pulled her up by her hair and forced her to get into his car, telling her that he wanted her to help him get money from ATMs. While en route to the bank, Virden insisted that she had to use the bathroom, and Lipsey stopped the car, and took Virden to a field as he kept the rifle on her. A Ridgeland police officer saw the car on the side of the road and stopped to investigate. After seeing the rifle, the officer drew his gun and ordered the man to drop the gun and stop moving. The man kept walking, got into the car, dropped the rifle and drove off. Virden began screaming and crying that she had been kidnaped from a house in Jackson. Jackson police were notified and found the three bodies at the address Virden gave them. Police developed Lipsey as a suspect after receiving his name from an anonymous caller who identified the suspect, "D," as Dexter Lipsey. Virden then picked Lipsey out of a photo line-up.

HELD: The trial judge did not abuse his discretion in excluding an alibi witness disclosed to the State just prior to trial. While Lipsey's counsel was forthcoming about the new alibi information, Lipsey himself was not. He had over one year to inform his counsel about the alibi witness and decided only to do on the day before trial. There was no violation of Lipsey's Sixth Amendment right to compulsory process, and the notification to the State was untimely under Rule 9.05.

==>The trial judge did not err in excluding evidence that the murder victims had cocaine in their systems or that the house was known as a "crack house." The court found both the victim's cocaine use and the community's belief the residence was a crack house to be irrelevant. Lipsey failed to show any connection between the fact that the victims had used cocaine, or had been shot in a place where cocaine may have been used, and Lipsey's alleged misidentification as the perpetrator of the crimes.

==>The trial judge did not abuse his discretion if failing to allow re-cross on Dr. Hayne concerning the time of death and the inventory of personal effects found on the victims. The trial court stated the defense could read part of the autopsy reports into the record as a proffer, but it was not necessary to call Dr. Hayne back to the stand to question him on the issue. However, no formal proffer was subsequently made by the defense counsel regarding the times of the victims' deaths. Lipsey failed to support his allegations that questioning Dr. Hayne about personal items or the times of death would have somehow adversely affected Dr. Hayne's credibility.

==>The trial judge did not err in allowing crime scene and autopsy photos into evidence. The photos showed the crime scene and location of the bodies. They were used by Dr. Hayne to supplement and clarify his testimony. The photographs had probative value, as they aided in describing the circumstances of the killings, showed the location of the bodies and causes of death, and clarified Dr. Hayne's and other law enforcement officers' testimonies.

==>Lipsey was not denied his statutory or constitutional right to a speedy trial. Lipsey was tried 428 days from his arraignment and 654 days after his arrest. Lipsey requested his case be dismissed for lack of a speedy trial 11 days before his trial. Since the defendant failed to raise this issue within 270 days of his arraignment, he effectively acquiesced to the delay. Looking at the *Barker* factors,

the main reason for the delay appeared to be a crowded docket and delays on forensic testing of evidence. Any prejudice suffered from the delay was caused by Lipsey himself.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO64091.pdf>

Grim v. State, No. 2008-KP-01920-COA (Miss.App. June 15, 2010)

CRIME: Sale of Cocaine

SENTENCE: Life without parole as an habitual offender

COURT: Tunica County Circuit Court

TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Frederick Denell Grim (pro se)

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed. Irving, J., for the Court. King, C.J., Lee and Myers, P.JJ., Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur. Carlton, J., Not Participating.

ISSUES: (1) the indictment was fatally defective for failing to include the dates of sentencing for his prior convictions; (2) he received ineffective assistance of counsel; (3) the circuit court erred when it refused to grant his motion for a directed verdict; (4) the circuit court erred when it denied his motion for a new trial; (5) the indictment was fatally defective for referencing two different habitual-offender statutes without specifying which statute would be used; and (6) cumulative error.

FACTS: On February 15, 2007, MBN agents and Tunica police officers met with Terry Reed, a confidential informant. Reed was outfitted with both audio- and video-recording equipment. Reed was searched at a pre-buy location and was given \$200. In exchange for non-prosecution of a marijuana charge, Reed agreed to work as a CI. Reed proceeded to Grim's residence. Grim exited the residence and approached Reed's vehicle and both went into the residence. After spending some time in the residence, Reed met officers for a post-buy meeting where he gave the officers cocaine that he had purchased from Grim. The videotape of the buy was played for the jury, and Reed explained what was going on at various points in the videotape. Reed testified that he knew Grim prior to purchasing the cocaine from him. A forensic scientist who performed the technical review of the lab analysis testified the substance Reed purchased was 3.2 grams of cocaine. Grim did not testify or offer any witnesses in his defense.

HELD: Grim's indictment listed his prior convictions, including cause numbers, the courts of conviction, the dates of the convictions, what crime Grim had been convicted of for each conviction, the dates of the offenses, and the length of sentences that Grim received. Clearly, this information complied with the requirements of Rule 11.03(1). The rule does not require that an indictment allege the date of sentencing for a prior offense.

==>Grim's allegations of ineffective assistance of counsel can not be determined from this record.

The COA affirmed his conviction and sentence without prejudice to his right to raise this issue again in a PCR.

==>The evidence was sufficient to support his conviction and the verdict was not against the weight of the evidence. Grim claims the individual who actually tested the cocaine did not testify. The expert testified that he reviewed the results that were generated by the technician and ensured that the proper tests were performed. His involvement was more than that of a mere custodian of records. His testimony properly established that the substance sold by Grim was, in fact, cocaine.

==> Grim's claim that the State's indictment improperly cited both §99-19-81 and §99-19-83, was procedurally barred for failing to raise the issue at trial. Regardless, the issue is without merit. The double reference was sufficient to give Grim notice that he could be sentenced under either section and gave him a fair opportunity to present a defense

==>There was no cumulative error.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO63169.pdf>

Ross v. State, No. 2009-KA-00796-COA, consolidated with No. 2009-KA-00797-COA (Miss.App. June 15, 2010)

CRIME: Gratification of Lust and Sexual Battery

SENTENCE: 15 years for the gratification of lust and a consecutive 40 years with 37 suspended and 5 years probation for the sexual battery

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. Samac S. Richardson

APPELLANT ATTORNEY: Phillip Broadhead and the Ole Miss Appeals Clinic

APPELLEE ATTORNEY: John R. Henry, Jr.

DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Myers, P.J., for the Court. King, C.J., Lee, P.J., Irving, Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur. Carlton, J., Not Participating.

ISSUES: (1) Whether the verdict was against the weight of the evidence, (2) whether the evidence was sufficient to support the verdict, and (3) whether Ross received effective assistance of counsel

FACTS: 37 year old Tyshunna Cooper Ross's indictments stemmed from her relationship with a 12-year-old boy, A.B. A.B., who was 14 at the time of trial, testified that on July 3, 2007, Ross invited him and two of his friends, both 14, to "hang out" with her at the home she shared with a roommate. Ross told the boys that she was locked out, so they sat out on the carport, smoked cigarettes and drank vodka. A.B. testified they later went into the woods and he kissed Ross and he fondled her breasts. Later that evening, A.B. and a friend sneaked two girls into his bedroom. His mother caught them and took the girls home. The following day, Ross told A.B. that her

boyfriend had beaten her and that she needed a place to stay. A.B. helped her sneak into his home, and they went to A.B.'s bedroom. A.B. gave her a beer from a case he had taken from his parents. A.B. testified Ross touched his penis and he eventually put on a condom and the two had sexual intercourse on the floor. A.B.'s mother later came in and caught them. A.B. initially denied any sex occurred. Ross apologized and eventually made contact with her roommate to come pick her up. Several days later, the mother found out about the alcohol and took A.B. to the police to give a statement. A.B. then told investigators about the fondling. After a CAC interview, A.B. finally told his mother about the sex. She brought him back to the police where he gave another statement admitting to intercourse with Ross. Ross did not testify and offered no witnesses in her defense.

HELD: Ross argued the weight of the evidence based on A.B.'s initial denials, his staggered disclosure of the sexual contact with Ross over several interviews, the several inconsistencies in his testimony, and that A.B.'s description of the physical act of intercourse was physically impossible or improbable. Ross's statement to police failed to sufficiently explain many of her actions and was contradicted by the testimony of the State's witnesses, whereas A.B.'s testimony was corroborated by the circumstances in which the two were discovered.

==>The verdict was also supported by sufficient evidence. A.B.'s testimony regarding the fondling and sexual intercourse was sufficiently credible, and it was corroborated by the circumstances in which he and Ross were discovered.

==>The record does not indicate Ross was denied effective assistance of counsel. She notes that defense counsel made no pretrial motions or objections during the trial, called no witnesses, and offered no jury instructions. She also claims the trial judge limited her cross of A.B. during an unrecorded bench conference. Ross's argument is substantiated only by allegations in her brief. Nothing in the record indicates that the trial court limited cross-examination or that trial counsel was ineffective in failing to make an objection or proffer, nor does the record show that Ross was prejudiced by these errors of counsel, if they occurred.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO63336.pdf>

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